Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Reza Ahmadi

Appellant, *Petitioner,*

VS.

THE STATE OF TEXAS

Appellee, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

PETITION FOR WRIT OF CERTIORARI

Reza Ahmadi

Pro Se

7302 Wooded Valley Dr.

Houston, Texas 77095

713-973-7393

QUESTIONS PRESENTED

1. Is the Due Process Clause violated when a defendant is not provided an opportunity for full and fair trial of his Fourteenth Amendment claim, because the state court did not apply the proper constitutional case law (instruction to jury, i.e. the presumption of innocence and the prosecution's burden of proof), there was also false evidence including untrue testimony offered by the state from their witnesses and state's failure to disclose exculpatory evidence?

2. Is the decision of the Court of Appeals letting stand petitioner's conviction and seven years imprisonment sentence despite the Court applied the legal sufficiency standard incorrectly, and court's reliance on "inference stacking", or unsupported presumptions to reach its decision in direct conflict with this Court's recent opinion in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); or any other decision of the United States Supreme Court and / or the Texas Court of Criminal Appeals?

LIST OF PARTIES

Danny K. Easterling 1018 Preston, 6th Floor Houston, TX 77002	Appellant's counsel at trial and on appeal
Hon. Patricia Lykos 1201 Franklin, Suite 600 Houston, TX 77002	Harris County District Attorney
Kate Dolan	Assistant District Attorney
Hon. Don Stricklin	Judge of the 337th District Court, Harris County, Texas

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IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner, Reza Ahmadi asks that this Court issue a writ of certiorari and reverse the judgment of the Court of Appeals for the Fourteenth District of Texas at Houston.

OPINIONS BELOW

The Decision of Court of appeals appears at Appendix A, and is unpublished. Order of Court of Appeals Deny Rehearing appears at Appendix B. The Decision of State Trial Court appears at Appendix C, and is unpublished. The Decision of Court of Criminal Appeals Rejecting Discretionary Review appears at Appendix D. Order of Court of Criminal Appeals Rejecting Rehearing appears at Appendix E. The Court of Appeals extension of time to file petition for a writ of certiorari with the U.S. Supreme Court appears at Appendix F.

JURISDICTION

The Court of Appeals affirmed the Judgment, and Memorandum Opinion filed on January 28, 2010. A motion for rehearing was denied on Feb.12, 2010. The Court of Criminal Appeals Refused Discretionary Review on October 6, 2010. The

Court of Criminal Appeals Rejecting Rehearing of Discretionary Review on October 25, 2010. The Court of Appeals extension of time to file the petition for a writ of certiorari was granted on Nov.18, 2010. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution, which provides, in relevant part, that "No state may deprive any person of life [or] liberty . . without due process of law."

2. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury").

STATEMENT OF THE CASE

An indictment in Cause Number 1118773, filed in the 337th District Court of Harris County, accused Ahmadi of Theft in an amount over $200,000, alleging Dennis Leahy as the victim (CR-2).[1] Also indicted, and tried together with Ahmadi, was Nereo Garza. A jury found Ahmadi guilty as charged (CR -58, RR IX-4). The jury

1 The clerk's record in Cause Number 1118773 is designated as "CR I." The reporter's record from the consolidated trial of Ahmadi and Garza is designated "RR."

assessed punishment at confinement for seven years in the Texas Department of Criminal Justice, Correctional Institutions Division, plus a $5000 fine (CR-65). Ahmadi gave timely notice of appeal (CR-70). The appellant presented three points of error. The Court of Appeals affirmed the judgment of the trial court in a memorandum opinion. A motion for rehearing was overruled. Pursuant to an extension of time, the appellant timely filed a petition with the Texas Court of Criminal Appeals for discretionary review. This Court refused discretionary review on October 6, 2010. Appellant filed a Motion for Rehearing of Appellant's Petition for Discretionary Review. This motion was rejected on October 25, 2010. The Court of Appeals extended the time for filing a petition for writ of certiorari with the United States Supreme Court.

GROUNDS FOR THE PETITON

The appellant seek petition of all three issues presented for reasons set forth below.

(1) Did the Court of Appeals err in holding that the evidence was legally sufficient to prove that the appellant intentionally engaged in a fraud? And the Court erred in stacking inferences in order to find proof of specific intent.

(2) Did the Court of Appeals err in holding that the explanation of the concept of reasonable doubt was proper? And the Court err in holding that error with respect to an explanation of the concept of reasonable doubt was waived?

(3) Whether the Court of Appeals opinion on this case conflicts with any decision of the U.S. Supreme Court and/or the Texas Court of Criminal Appeals.

ARGUMENT AND AUTHORITIES

POINT OF ERROR ONE

The evidence was legally insufficient to sustain the conviction because it failed to show that the appellant intentionally engaged in a fraud, either by himself or with the co-defendant, and the Court erred in stacking inferences in order to find proof of specific intent.

This prosecution arose from an allegation that Ahmadi, who was the owner of a computer repair company, stole money from Hewlett Packard through the administration of a computer repair contract for the St. Agnes School in Houston.[2] Ahmadi and Nereo Garza were tried together, and each was convicted.

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2 The named complainant, Dennis Leahy, was a security official for HP.

The appellant maintains that the evidence was legally insufficient to show that he had intent to defraud anyone, either at the School or at Hewlett Packard.

The first point of error challenges the legal sufficiency of the evidence. The State presented no evidence that Ahmadi knew that monies he received were acquired by deception, which was the State's theory as to why the appropriation was without the effective consent of the owner. Even when viewed in the light most favorable to the verdict, the evidence failed to show that Ahmadi was aware of, let alone promoted, any theft by codefendant Garza, who controlled the day-to-day repair operation and the related paperwork.

A. Legal Sufficiency Principles

The State had the burden of proving beyond a reasonable doubt that is a requirement under the due process clause of U.S. CONST. Amend. XIV. Specifically, the State has the burden of proving *each element* of the charged offense, including intent, beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); TEX. PENAL CODE §2.01. The standard for appellate review under *Jackson* is whether, viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In conducting a legal sufficiency review, the Court of Appeals noted that:

> "We do not ask whether we believe the evidence at trial established quilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318- 19 (1979)." Appx A., p. 6-a.
>
> "We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we are defer to that resolution. *Id. At133 n. 13.*"Appx A., p. 7-a.

In Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).The question the reviewing court is to ask itself is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

In the United States Supreme Court's recent decisions interpreting the scope of two "companion rights":[3] the due process right to a "beyond a reasonable doubt" determination and

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3 *See* Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) (referring to the proof beyond a reasonable doubt standard as a "companion right" to the right to a trial by jury).

the right to trial by jury. The right to a jury trial in criminal prosecutions is explicitly protected in the Sixth Amendment to the U.S. Constitution.[4] the "proof beyond a reasonable doubt" standard is guaranteed by the Due Process Clauses of the Fourteenth Amendment (state proceedings).[5] Together, those constitutional provisions require that a criminal conviction follow a jury determination of "proof beyond a reasonable doubt of every fact necessary to constitute the crime."[6]

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4 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury"). The Sixth Amendment jury requirement applies to state prosecutions by virtue of that amendment's incorporation in the Due Process Clause of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

5 U.S. Const. amend. XIV ("No state shall ... deprive any person of life, liberty, or property, without due process of law....").

6 In re Winship, 397 U.S. 358, 364 (1970). *See also* United States v. Gaudin, 515 U.S. 506, 510 (1995) ("[The Due Process Clause and the Sixth Amendment] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.") (citing Sullivan v. Louisiana, 508 U.S. 275, 277 - 278 993)).

B. A Questionable Analytical Framework

A conviction may rest upon culpability for conduct of another. Under TEX.PENAL CODE §7.02(b), a specific intent to assist or promote another person's commission of the charged offense must be shown.[7] The Court of Appeals, realizing that there was no evidence that the appellant personally defrauded anyone, relied on the theory that the appellant was responsible for Garza's actions. Appx A., p. 9-a.

The problem lies in the Court of Appeals' interpretation of the law of parties, which has three major analytical flaws.

First is the flaw of using a standard which may confuse cooperative business with cooperative crime. The Court of Appeals minimized the importance of a specific intent. Citing *King v. State*, 17 S.W.3d 7, 15 (Tex. App. – Houston [14 Dist.] 2000, pet. ref'd), the Court of Appeals stated that the "circumstantial evidence must show that, at the time of the offense, the parties were acting together and that each party somehow contributed to the execution of their

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7 Two alternative forms of culpability were not presented to the jury. First, the jury was not instructed on the "conspiracy" form of the law of parties, and the prosecution did not ask for such an instruction. Second, an individual can be prosecuted for the activities of a business entity under TEX. PENAL CODE §7.23, but that theory also was not presented to the jury.

common purpose." Appx A., p. 9-a. *Every* business involving more than one worker consists of people "somehow" contributing to the execution of a "common purpose." The wording from *King* may be helpful in understanding the breadth of the *actus reus* component of Section 7.02, but it is *not* an acceptable substitute for the statutory definition of the law of parties, since the *King* language omits the requirement of a specific intent. Proof that Ahmadi worked with someone else toward the "common purpose" of providing a service and making money does not equal proof that Ahmadi had the specific intent to make money illegally by defrauding someone. Similarly, the Court of Appeals confused the standard for identifying shared crime when it observed that the jury "may infer an agreement among a group working on a common project when each person's action is consistent with realizing a common goal,"citing *Jarnigan v. State*, 57 S.W.3d 76, 87 (Tex. App. – Houston [14th Dist.] 2001, pet. ref'd). That formulation also ignores specific criminal intent. Resort to *King* and *Jarnigan* in this cause led to the application of a standard which was at odds with a statute, *i.e.* Section 7.02, which was justified to be reviewed by the Texas Court of Criminal Appeals, under TEX. R. APP. PROC. 66.3(d).

Second, the Court of Appeals' approach is not consistent with other case law describing the requisite proof for theft in a business context. *Jacobs v. State,* 230 S.W.3d115 (Tex. App. – Houston [14 Dist.] 2006) explained: "In a contract claim, the State must prove the defendant did not perform the contract and *knew he was not entitled to the money*, not merely that there is a dispute about the amount rightfully owed" (emphasis added). The State must show that money was obtained by deception. *Id.* At 230. The Court of Appeals' opinion did not even mention *Jacobs.* Nor did it mention two other cases, cited by the appellant, which are instructive with respect to culpability for theft committed by a business subordinate. In *Hefner v. State*, 735 S.W.2d 608 (Tex. App. – Dallas 1987), Hefner was an attorney who was personally directing the actions of his own law firm employees as they engaged in an elaborate plan to take a client's money and carry it to another state. There it was placed in a safe deposit box and then periodically raided for purported fees and for Hefner's operating expenses. The Dallas court of appeals found that Hefner "orchestrated" each of those transfers, specifying to his office manager how much of the money to take out on each occasion. *Id.* at 615. In a Fifth Circuit decision concerning mail fraud,

United States v. Ragan, 24 F.3d 657 (5 Cir, 1994), Ragan engaged in arbitrage trades of U.S. Treasury securities, and it was alleged that Ragan manipulated the assignment of trades rather than executing trades as they were placed, and that Ragan engaged in fictitious trades in order to generate commissions. In finding that Ragan did not engage in a scheme to defraud, the Fifth Circuit first noted that Ragan did not personally enter any information on the trade tickets. Addressing parties culpability for a subordinate's entry of trade data, *Ragan* carefully distinguished between testimony about general policy in Ragan's office and Ragan's involvement in particular trades identified in the indictment, finding insufficient evidence as to the particular trades. Similarly, in this cause there was evidence showing that Ahmadi had general supervisory responsibility for the business, but a paucity of evidence linking Ahmadi to particular improper transactions.

Third, The Court of Appeals erred in stacking inferences in order to find proof of specific intent. For example: the court relying in part on "evidence that appellant did not cooperate fully with investigators." Appx. A., p.17- a. The Court noted, "that the appellant did not disclose the commission agreement to the police after

being asked whether he gave anything of "value" to Garza. His only disclosure was that he provided Garza with rodeo tickets on one occasion", despite the fact that appellant had not been interviewed by the police. The Court also noted that the appellant did not provide or disclose HP with certain documents. Once again, however, the Court had to rely on inference, or more precisely, inference stacked upon inference. The first inference in the Court's reasoning would be that the omissions which were deemed a lack of cooperation were deliberate rather than negligent. As a matter of constitutional doctrine, a person suspected of wrongdoing has a right to not cooperate with law enforcement, but for the sake of argument, consider only the perceived lack of cooperation with private business officials. What is called a lack of cooperation in hindsight might have been nothing more than a lack of organization.

Nothing but speculation supports the view that the correct explanation for the appellant's behavior is the sinister explanation. No rational trier if fact could have convicted appellant beyond a reasonable doubt.

Having inferred the worst as to the appellant's failure to produce certain paperwork, the Court of Appeals then had to use that inference to support

yet another inference that any such deliberate concealment was intended to hide a theft conspiracy. Such stacking of inferences breaks the connection between what the State actually proved and what conclusion is inferred.

Excessive resort to staking inferences moves the State's burden away from a burden of proof, *i.e.* production of evidence.

C. How the Flawed Theory Impacted Evidentiary Review

The administrators of St. Agnes high School decided in late 2000 to acquire laptop computers to be used by the students (RR V-30).

Mr. Michael Capellas, the former Chairman and CEO of Compaq Computer and former board member for the St. Agnes, while he was a member, he has influenced the sales of Compaq Computers to St. Agnes. The head of the School, Sister Jane Meyer testified and admitted that Mr. Capellas had an active role as a member of the board at St. Agnes at that time, but she denied his influence on the sales of the laptops, despite the fact that the School adapted the Compaq technology at the same time period for launching its "laptop Program".

The School arranged for repairs to be made at an in-house facility called the "C.A.V.E." (RR IV- 109,

V-30). The C.A.V.E. was manned by Nereo Garza, who was hired as a St. Agnes employee in 2002 (RR IV- 109, V-31). Repairs covered by warranties were to be paid for by the manufacturer, Compaq (and subsequently by corporate successor Hewlett Packard, "HP") (RR V- 34-35).

The Compaq laptops were defective and did not work; Compaq had class-action law suits against them, and they have lost the case as the result. Michael Nolan, an investigator for the District Attorney's Office, testified that he had heard about class-action lawsuits which had been brought due to the high breakage rate for Compaq/HP laptops during this time period, but he did not know any details of the suits (RR VI-143).

Cheryl Barr testified that she worked for Intelligent Interface, developing marketing programs (RR VII- 176-177). this brought her into contact with officials at St. Agnes and other Schools, and they discussed the fact that School children "were less careful" with computers than adult users were and there would be a higher repair rate (RR VII-178).

Jenny Theiss, from the warranty claims compliance section of HP, said a contract between HP and Intelligent Interface indicated that Ahmadi was the owner of Intelligent Interface

(RR VI-159). Theiss explained that a contract "service partner" like Intelligent Interface is paid a labor reimbursement for service work, including parts installation (RR VI-157). Theiss also conceded that, in the two years in which she had been compliance manager over the dealings with Ahmadi's firm, she never had any contact with Ahmadi himself (RR VI-215).

Instead she talked to Keevin Lee, the HP "partner service delivery manager" (*i.e.*, HP's employee, not Ahmadi's employee) "on several occasions" about the number of parts per serial number. Lee, not Ahmadi, assured Theiss that he "checked into it" and that it was due to "the environment in which the students were working in" [sic] (RR VI-215-216).

Lee also told Theiss that the particular Compaq computer provided to St. Agnes students had "a lot of defects," characterized as "product quality issues" (RR VI-217).

Theiss "speculated" that Lee told Ahmadi about the problem of the parts per serial number, but she did not know (RR VI-217).

Lee was laid off by HP and not available to testify at trial (RR VI-216).

The defective laptops as well as the School's negligence not evaluating other manufactures, were the direct result of the "laptop program"

failure. As the result, a few years into the program the School had to seek outside help for support, despite the fact that the School was a Self Maintainer,"SM".[8] and did not need to go out. Consequently the School had to engage a local service provider, Atiwa Compting inc.,"Atiwa" Garza was assisted on repairs covered by warranties by technicians from Atiwa (RR V- 32). Rose Ann Cook, the technology director for the School did not know how Atiwa processed the warranty claims (RR V-33).

At the beginning of the 2003 School year, the St. Agnes laptops – almost 700 of them – fell victim to a massive computer virus attack (RR V- 40-41). The School was out of commission for over a month. Atiwa quoted an exorbitant price for making a system wide repair, and Cook was "not happy with the quality of technician that they sent over" (RR V-41).

Garza recommended that Ahmadi's firm, Intelligent Interface, be given a chance to do the work. Cook was favorably impressed by the diligence with which Ahmadi's technicians solved

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8 For St. Agnes to become qualify as a "SM" they were required minimum purchase of $1,000,000 annually as well as:

a. Students to purchase laptops from the School.
b. School to provide employee certified technician.
c. School to manage the program.

the virus problem (RR V-41). Ahmadi was given the contract for computer repairs. Over the next two years, Cook thought the repair operation in the C.A.V.E. was working well (RR V- 80). She never got any complaints from Compaq/ HP about any problems with parts orders (RR V- 80-81). Ahmadi assigned employee Daniel Pham to work on the St. Agnes account in 2003 (RR VI-11). Pham's job was to fix hardware at the direction of Garza. When students brought computers to the C.A.V.E., Garza received them and told Pham what the problem was (RR VI-15). "The diagnosis was done at the window" Pham said, and Pham would work on whatever problem was written on the repair worksheet (RR VI-16). Pham said there was not an in-house inventory of parts when he first went to work at St. Agnes (RR VI-18). Thus Pham would have to order a part, wait until it was delivered, and then make the repair (RR VI-19). It was Garza who actually placed the orders for the parts (RR VI-20). After six or seven months a parts inventory began to build as Pham found himself facing "laptops stacked up like this high" waiting for repairs (RR VI-22).

Pham said he wondered whether the work being done was excessive, as "we were, basically, replacing almost every part on a laptop" (RR VI-25). He did not, however, "say anything to nobody [sic] about

it" (RR VI-25).[9] Pham said he "believed" he was told to install parts not necessary for the warranty repair (RR VI-31). Pham did *not* say that Ahmadi told him to do that. Ahmadi just told him to "do my best" and to follow Garza's instructions (RR VI-31). Pham saw nothing wrong with that (RR VI-58). Pham said he did whatever Garza told him to do (RR VI-31). He said Ahmadi and Garza talked on the phone but Pham did not remember how often that occurred (RR VI-33). No one came out from HP to explain that Garza and Pham were doing anything wrong at the C.A.V.E. (RR VI-65). Pham said he believed Ahmadi was only being paid on warranty work and St. Agnes did not pay Ahmadi any money (RR VI-92).

The School's management also removed them selves from the day to day operation responsibilities[10], which played a substantial part

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9 Later Pham said he complained about the "workload," but did not tell Ahmadi about unnecessary parts being ordered. Pham "thought he would already know all that stuff" – mere speculation on Pham's part (RR VI-32).

10 The computers fell under the supervision of Rose Ann Cook (RR V-29). Cook did not know how Atiwa processed the warranty claims (RR V-33).

Although Cook was the supervisor over Garza Pham rarely saw her, and she never came by to complain about the paperwork on the computer repairs (RR VI-59).

In the summer of 2005 Hyams replaced Cook as the technology director for the School (RR III- 44-45).

in bringing about or directly causing the School personal's engaging in misconduct.

Hyams came to Meyer, the "head of the School" to report problems with the operation of the C.A.V.E. (RR III-46). When Garza was confronted, he admitted to Meyer that he was replacing parts that had not been reported as being broken (RR IV-14).

After Garza's dismissal, the School went back to its original "laptop program", "SM". [11]

Meyer also had a discussion with Ahmadi and showed him a list of 28 warranty orders made on one day (RR IV-26). Ahmadi said he had told Garza not to submit more than one warranty claim per student within a month (RR IV-27). Ahmadi acknowledged that he provided an inventory "to help turn things around in a quick way" (RR IV-27-28).[12]

Hyams was rude to Pham (RR VI-71)[13]. It seemed

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11 Hyams testified that he completely revamped the computer maintenance program, putting in place three St. Agnes employees who answered to him (RR V-6).

The salaries for Hyams and these three certified technicians was around $750,000 over three years (RR V-6).

12 Hyams admitted that his system "increases costs [to the School and students] but it allows us to get parts quicker" (RR V-15) – the same goal that appellant expressed.

13 Anyone who has ever worked in a bureaucracy would recognize this pattern as Hyams bringing in his own men to do it his way.

as if Hyams was trying to get rid of Pham (RR VI-71). Hyams testified that, while looking through the C.A.V.E. to evaluate what changes to make, he discovered pads of paper with lists of parts numbers, 1 through 28 (RR IV-134). He found boxes containing parts which seemed to correspond to these lists (RR IV-136). Additional pads were found (RR IV-138). Hyams then cross referenced serial numbers with student identification numbers and detected "a rotation of serial numbers," with numbers being reused every two months, and Hyams could not find service tickets which matched the dates on the pads (RR IV-139).

What Garza actually was doing, as shown by State's Exhibit 2, was writing down lists on pads of paper, purporting to show the number of a computer, the part to be replaced and the student identification number of the student to whom the computer was assigned. Garza admitted to Leahy that the pads were in his handwriting (RR V-224).

The student identifications were used in rotation, and each page of the lists also showed a 33-day or 34-day period at the top. That information would facilitate avoidance of a warranty policy rule against submitting multiple warranty claims for one computer within a 30-day period.

Dennis Leahy, an investigator for HP's security division, was the named complainant (RR V-155).In all of his testimony, Leahy never said that he had a greater right to possession of the money in question than Ahmadi had. He said he received a complaint about fraud at St. Agnes in August, 2003 (although he must have meant 2005) and met with St. Agnes administrators (RR V-157).

Leahy met with Ahmadi and Ahmadi's "purchasing person," Chris Cardenas (RR V-158-159). Ahmadi explained how Pham made repairs, often using spare parts from an inventory (RR V-160).

Ahmadi told Leahy that "he had a lot of money, up to 150, $200,000 invested in St. Agnes and that he had 50 to 75,000 [dollars] in parts that were his property at St. Agnes"(RR V- 161)[14]. Cardenas told Leahy that the spare parts were used in warranty work in order to get a 'quick turnaround," then replenished by warranty claims later (RR V-163).

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14 Ahmadi testified and presented documents with the break down, totaling $985,230.00 worth of services provided to St. Agnes during the two years, at no charge to the school.

Garza admitted Ahmadi brought in parts that he already purchased himself. He already had a stock, I believe. And he would bring me extra parts in and I just kept them in stock. (RR VIII-116).

Leahy said that was "a bit unusual" because "HP strives to have the parts delivered in 24 hours if they're not on back order" (RR V-163). Leahy did *not* say the arrangement either was unique or was prohibited. Leahy said that parts "usually" would get delivered "the next day" after ordering (RR V-163). Ahmadi told Leahy that the first he had heard of the rotation of students' names to order parts was when he was told by a School official (RR V168)[15]. Cardenas showed Leahy work orders for parts ordering, which Cardenas had created at the Intelligent Interface office (RR V-171).

Leahy asked Ahmadi for proof that Ahmadi owned the parts stockpiled at St. Agnes, and while Ahmadi provided a spreadsheet (An Aging report from HP's accounting for purchased parts), he never provided invoices or other proof of his purchases (RR V-172).

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15 On cross-examination Leahy said Ahmadi cooperated with him and that Leahy had heard from the School officials that Ahmadi told them he would help them any way he could (RR V-212-213).

Leahy described the different levels of compensation for HP service providers, using a measure of "parts per serial number." The lower the number of parts used, the higher the labor compensation would be. Intelligent Interface held "premier" status, the best category (RR V- 180-182). [16]

Hyams said that for Ahmadi to maintain his "premier" provider rating with HP (and concomitant higher rate of pay), it was desirable to get close to a rate of using only one part per repair (RR V-11).

Hyams ultimately had to concede, however, that he could not blame Ahmadi personally for the parts orders (RR V-22).

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16 Court of Appeals noted: "Under the reimbursement process, appellant would obtain more money through his premier status by ordering more parts than were needed."

The jury could infer that appellant knew of Garza's rotation scheme after hearing that appellant was aware that Garza often changed serial numbers after being notified that more than one claim had been made on individual laptops during the previous thirty days, a practice appellant had informed Garza was improper. Appx A., pp. 12-a, 13-a

Theiss said there was "no window that pops up and tells them that they can't order the part again" (RR VI-209)[17], meaning Cardenas was not given notice of the problem, at the time of data entry. "They just won't get paid for it," Theiss said (RR VI-209). The problem would not be noticed, Theiss conceded, until someone at Intelligent Interface was "reconciling on the back end" (RR VI-209).

On cross-examination Theiss said she only had a "quick introduction" to Ahmadi in 2003, but it was common for the owner of a servicing firm to meet her only briefly and then leave matters in the hands of a service manager – in this instance, Chris Cardenas (RR VI-204).

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17 Court of Appeals noted: "Christopher Cardenas, the I.I. employee responsible for ordering parts for St. Agnes, stated that he was alerted on multiple occasions by HP's ordering system that warranty orders were being made for individual laptops more than once every thirty days. After asking appellant how to proceed, he was told to "call [Garza] and tell him he cannot order on that serial number." Garza would then either provide a different serial number to use or tell Cardenas to forget about ordering for that particular computer."

From this evidence, the jury could reasonably infer that both appellant and Garza were contributing to the execution of a common purpose. See *Jarnigan*, 57 S. W.3d at 87 (jury may infer agreement when each person's actions are consistent with reaching a common goal); *King*, 17 S. W.3d at 15. Appx. A.,p.12-a

Cardenas did not know that Garza had engaged in alphabetical rotation of names in placing orders, and he believed Garza was sending him legitimate repair claims (RR VII- 97-98).
When a problem arose from multiple orders within thirty days for the same computer, Cardenas was told by Ahmadi to inform Garza that he could not order on that serial number (RR VII-100). Cardenas said Garza would give him a different serial number or tell Cardenas to "forget about it," but Cardenas was not clear as to how often, or specifically when, that occurred (RR VII-100).
Later Ahmadi talked to Lee on this, who said that a problem of that type needed to be referred to "tech support" at HP (RR VII-101). That task fell to Pham, who was doing the actual work on site, but it was a "big headache" because of long delays on the phone when tech support was called, Pham said, (RR VII- 102, 116). It could take "half a day" to get tech support approval (RR VII-118). Once that was done, however, the parts orders "always went through" (RR VII-101). Cardenas and Garza never discussed using a different serial number due to time constraints in getting a part (RRVII-166).

The State emphasized the "rotation" scheme used by Garza, was their evidence to show that

Ahmadi knew the rotation of names was being used to order parts from Compaq or HP which should not have been covered by warranty? Garza, Cardenas, and Pham were the only people in a position to possibly know the answer to that question, and none of the three said Ahmadi knew about it.

While Ahmadi was contributing to a legitimate "common purpose" of repairing the computers, it was not shown that he and Garza had an illegal "common purpose" of overbilling via the rotation scheme. Ahmadi was more like the supervisor in *Ragan*, who let a subordinate's actions get him into trouble, than he was like the lawyer in *Hefner* who actively participated in a scheme.

Garza admitted that he was making false claims on the warranties (RR V- 176-177). It started small and then "magnified" until "eventually everything was false" (RR V-177). Garza then admitted using a name-rotation system for ordering parts (RR VIII- 111-112).

It was not shown, however, that Ahmadi was aware of this mushrooming problem. More importantly, it was not shown that Ahmadi *specifically intended* to inflate billings to Hewlett Packard through the name-rotation scheme carried out solely by Garza.

Theiss told Cardenas in 2003 that more detailed reports were needed regarding the St. Agnes account, and Theiss insisted that "It was Intelligent Interface's responsibility" (RR VI-205)[18]. The question of who actually filled out the orders at St. Agnes were "not my concern," Theiss said, and she admitted that she did not know who actually filled them out (RR VI-206).

Theiss said her concern was whether Intelligent Interface "met the terms and conditions" of its contract with HP (RR VI-205). Theiss conceded that Chris Cardenas would actually provide the information to HP via Internet (RR VI- 207-208). Asked whether Cardenas or anyone else would see the alphabetical sequence of orders, in light of the fact that student numbers rather than names were used when ordering parts, Theiss admitted "I don't know what information Chris Cardenas was given" (RR VI-208).

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18 Court of Appeals noted: "On at least one occasion, HP conducted an independent investigation due to the high number of claims and lack of documentation related to St. Agnes's computers. HP instructed appellant to provide more thorough information in his future orders." Appx A., p.1a

Theiss said the figure of over $2 million was the fair market value of the parts involved, and Ahmadi did not receive that money (RR VI-213)[19]. The Court of Appeals' review of the evidence stated that "the two men," *i.e.* Ahmadi and Garza, "agreed to make [Intelligent Interface] the HP warranty repair provider." Appx A., p.10 - a. Actually Ahmadi's firm earned the trust of St. Agnes official by curing the virus problem, and the School officials were glad to have Intelligent Interface as a new vendor. Garza already was in place at St. Agnes, and there is nothing suspicious about keeping a worker who had not yet been found to be engaged in anything improper.

Shortly after Intelligent Interface started its work at St. Agnes, Garza contacted Ahmadi, indicating that he wanted to be paid. Garza told Ahmadi that "he's already having some contracts with other people in School, "teachers and student's parents", and others could do the job" (RRnVII-207).

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19 Compaq or HP never provided any evidence to show that the return/exchange warranty parts were abused or fraudulent, *i.e.* parts were broken intentionally or were fully functional (faulty claim). Thus the return parts were defective.

While at first blush that might suggest a "kickback," such as would be illegal in government contracts, "rebates" are a common practice in the information technology business (RR VII-207)[20].

The Court of Appeals noted that Garza was paid a commission, but that is common in service industries (RR VIII- 41-42)[21].

After discussing the commission with human resources director, Ahmadi decided he could put Garza under contract and pay him a commission of 19 percent on labor work (RR VII-209). All of that was reflected on1099 forms and fully reported to the I.R.S. (RR VII-210).

Even if Ahmadi's payments to Garza allowed Garza to continue his deception, there was no evidence that Ahmadi's working arrangement with Garza was set up with the intent, on

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20 Ahmadi testified and provided evidence that manufactures like HP, Compaq, IBM, NEC Technology, Toshiba have used this common practice regularly, by honoring commission checks to I.I.'s employees to support their products and services. At the end of each year these manufactures have issued the 1099 form directly to those employees to report their additional income to IRS.

21 if Ahmadi had intended to kick back money to Garza as part of an inflated billing scheme, why would Ahmadi issue company check instead of cash, and place evidence of the payments in the hands of a federal law enforcement agency?

Ahmadi's part, of not honoring the warranty rules. There was no evidence that Ahmadi intended for Garza (and the unwitting Cardenas) to engage in a "ruse" to accomplish theft by deception.

The Court of Appeals also noted that one commission check had a date before the virus attack. From those scant facts it was inferred that Ahmadi and Garza must have planned for Ahmadi to take over the St. Agnes account, not just for the purpose of getting the business, but to "[lay] the framework for their scheme to unlawfully obtain money from HP"Appx. A.,p.11-a

This is appellate inference which has run amok. The Court of Appeals observed that Garza was told not to submit multiple orders for a particular laptop within 30 days. The reality that Garza faced, however, was that he had students and their parents demanding that repair work be done immediately. Garza told Leahy that "the School had him under a lot of pressure" and "he went to the student card catalogs because it was quick and expedient and that he could order the parts right away"(RR V- 174-175).

The Court of Appeal noted that "Garza also testified that he "[k]ept [appellant] in the loop about how business was going" and what he was doing at St. Agnes." Appx. A., p.15-a. However,

Garza said Ahmadi was "in the loop" about operations at St. Agnes, but Garza did not say that Ahmadi knew the particulars of the operation:

Q [Prosecutor]. And he knew the way the operation was being conducted at the School?
A.I do not know. Basically, I would just tell him what the history was of what was happening with all the parts. (RR VIII-108).

Cardenas said he had no indication that Ahmadi knew of what Garza actually was doing (RR VII-104). He denied that he eventually "figured out" Garza's pattern of rotating names alphabetically (RR VII-141).

Regarding appellant relationship with Compaq and HP, Ahmadi said he was never told that his firm was doing anything wrong (RR VII-203). Ahmadi did not know that Garza was placing parts orders by alphabetical rotation of students' names rather than according to actual need (RR VII-205). Since Intelligent Interface had over 450 customers nationwide, Ahmadi could not spend a lot of time examining Garza's work (RR VII-216).

Judith Golike, a fraud investigation specialist in the district attorney's office, researched funds flowing to Intelligent Interface[22] and Garza. She concluded that: Intelligent Interface conducted "business legit". Garza was paid $171,068 which was 19% of what Intelligent Interface was paid by "HP" and "IBM" (RR VII-46). The Court of Appeal noted "19% "commission" for any HP warranty". Appx. A., p. 10 -a

A few months into the supporting of the program, Intelligent Interface realized the seriousness of the problems at the School, and contacted IBM through email, that reads: "The situation and crisis at the St. Agnes School due to the HPs' high defective rate is getting worse", and "requested for IBM to get involved". IBM did get involved and took over the account. Once IBM laptops were deployed the School environment started to change.

22 Nolan also said that he was told by Cook that checks which had been made payable to St. Agnes were used to pay third-party vendors, without endorsement of the checks (RR VI-134-135). The Court of Appeals noted, "That Safeware checks made payable to St. Agnes were habitually deposited into bank accounts managed by I.I.". Appx. A., p. 4-a.

The reports from IBM shows that warranty work performed by I. I. for the period of one year were for the two Schools (St. Agnes and Episcopal High School), and averaged 3 repairs per day, instead of 23 per day, with Compaq's alone at St. Agnes. The Court of Appeals noted that:

> "Appellant argues the number decreased because the School switched to more reliable IBM laptops; however, there were still students using HP computers after Garza's dismissal". Appx. A., p.14-a.

Appellant did not make such an argument. Because IBM[23] evidence has been withheld by the prosecutor, thus preventing its production at trial.

The head of the School, Meyer testified that, "I was surprised that Ahmadi did not charge the School for the three weeks of virus work", an untrue testimony by Meyer—therefore, the entire testimony of such witness is to be distrusted. Subsequently the Court of Appeals draws from this false statement and notes:

> "Appellant did not charge the School for this repair work. St Agnes subsequently secured I.I. as it's HP warranty repair provider, and appellant began assigning I.I.

23 IBM was the fourth named complainant in this cause.

> technicians to work in the C.A.V.E. full-time". Appx. A., p. 4-a.
>
> "The jury could consider this evidence and infer that appellant was an active participant in Garza's rotation scheme. Garza pushed for St. Agnes to hire I.I. to repair the computer virus, and appellant decided not to charge the School for completing the repairs". Appx. A., p 16-a.

The fact is that Ahmadi did invoice St. Agnes for the three weeks of virus work, and the School paid I.I. with the check which was deposited into I.I. bank account (State has the record of funds flowing to I.I.).

The prosecutor stated in closing argument:

> Now, flat out clear as I can make it with you, our allegations in bringing the criminal charges against these two men is that they participated in a scheme, the scheme of creating the warranty orders through the lists, through the rotation of the alphabet, through the rotation of the serial numbers, through the introduction of false insurance claims ... (RR VIII-130).

State prosecuting had knowingly used false and untrue testimony and wilfully suppressed evidence (School's payment to I.I., and IBM), all of

which was material to the issues in this case and very probably resulted in Ahmadi's conviction, in violation of due process guaranteed by the U.S. CONST. Amend. XIV.

Ahmadi testified in his own defense. He had been a United States citizen for over thirty years and had received a master's degree in engineering from the University of Houston (RR VII- 182-183). He founded Intelligent Interface in 1994, and the firm soon had some major corporate clients (RR VII- 187-188).

POINT OF ERROR TWO

Did the Court of Appeals err in holding that the explanation of the concept of reasonable doubt was proper? And the Court error with respect to an explanation of the concept of reasonable doubt was waived?

Point of Error Two concerns judicial comments during voir dire which diluted the concept of proof beyond a reasonable doubt. The absence of a formal reasonable doubt definition is usually rationalized by saying that the concept has a commonly understood meaning. In this cause, however, the jurors were not urged to determine the commonly understood meaning and apply it, but rather were urged to each apply the concept as they individually understood it.

The judge explained the State's burden of proof in this manner:

> "Here's the deal on reasonable doubt. The Court is not going to – not only here but anywhere else in this State – is not going to define for you what a reasonable doubt is. The Court of Criminal Appeals has told us that is up to each individual juror to decide in his or her own mind so that this juror gets to decide, this juror gets to decide, this juror gets to decide through all 12 of you. There's not going to be a light, no buzzer, no whistle, nothing that goes off to say, okay, the State has met its burden. It's up to you to decide when you are convinced beyond a reasonable doubt as to each element of the offense.

(RR II-36). There was no objection to this definition.The Court of Appeals held that error was waived, citing *Fuentes v. State*, 991S.W.2d 267, 273 (Tex. Crim. App. 1999). Appx. A. p.20 -a. Yet the law concerning the related concept of the presumption of innocence is that statements during voir dire which undermined the presumption of innocence constitute "fundamental" error, and thus are not waived by failure to object. *Blue v. State*, 41 S.W.3d129 (Tex. Crim. App.2000).

The same rule should apply here, for as *In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1970) stated, the burden of proof is the concrete application of the presumption of innocence. The Court of Appeals shrugged off *Blue* because a plurality opinion is "not binding precedent." Appx. A. p. 21-a. In practice, however, lawyers rely on *Blue* when dealing with the sensitive question of whether to tell potential jurors, early voir dire, that a judge is misstating the law. Furthermore, to the extent *Fuentes* and *Blue* conflict, that situation needs to be resolved by this Court.

The Court of Appeals also held, in effect, that the instruction was proper. Appx. A p. 22-a.[24] The Court of Appeals seems to have viewed the problem as merely one of different jurors having "differing thresholds of reasonable doubt."Appx. A p. 22-a.Actually the problem is a Fourteenth Amendment issue of due process of law, and perhaps the Sixth Amendment right to jury trial as well. *Victor v. Nebraska*, 511 U.S.1,114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *Morris v. Cain*, 186 F.3d 581, 587 (5th Cir.1999). In some jurisdictions

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24 The Court of Appeals concluded the instruction did not "create an impermissibly low standard," but then looped back to a conclusion that error was waived. Appx. A p. 22-a.

a definition, or at least an explanation, of proof beyond a reasonable doubt is provided in the court's written instructions to the jury. *See United States v. Williams*, 20 F.3d 125, 128, n. 1 (5th Cir. 1994), *cert. denied* 513 U.S. 891,115 S.Ct. 239, 130 L.Ed.2d 162 (1994) regarding the Fifth Circuit pattern instruction.The problem is that judges often try to give an explanation during voir dire which amounts to a definition. As stated *in Williams, supra* at 128:

> [A]ny definition of reasonable doubt that a district court does use must, "taken as a whole, ... correctly convey[ ] the concept of reasonable doubt to the jury." *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127,138, 99 L.Ed. 150 (1954).

Morris v. Cain, supra at 588 reiterated that "when a court elects to make such an instruction [on reasonable doubt], it must meet constitutional criteria." *Young v. State*, 648 S.W.2d 2, 3 (Tex. Crim. App. 1983) relied on *Winship* in finding that a definition of proof beyond a reasonable doubt was constitutionally deficient.

The appellant directed the Court of Appeals' attention to *Wansing v. Hargett*, 341 F.3d 1207 (10 Cir. 2003), the *cert. denied* 540 U.S. 1091, 124 S.Ct. 960, 157 L.Ed.2d 797 (2003), which held that a voir dire explanation created a

constitutional problem.

The Tenth Circuit approached the issue as being governed by the case law, such as *Victor*, which applied to written jury instructions. Drawing upon *Victor*, *Wansing* said the issue was whether there was a reasonable likelihood that the jury understood the judge's voir dire comments in a way that allowed conviction based on proof insufficient to meet the reasonable doubt standard. *Id.* at 1213. The same risk was created here.

POINT OF THREE

Whether the Court of Appeals opinion on this case conflicts with recent opinion in the United States Supreme Court And /or any decision of the Texas Court of Criminal Appeals?

The Texas Court of Criminal Appeals has examined a similar case in *Hooper v. State of Texas*, 1352-05, and notes that:

We granted review to determine whether the court of appeals erred in holding that the evidence was legally insufficient to support Appellant's conviction. The State urges two reasons for review:

1) [T]he Court of Appeals incorrectly applied the *Jackson v. Virginia* standard of review in

finding the jury verdict "irrational."

2) [T]he justices of the Court of Appeals disagreed on a material question of law necessary to the Court's decision, to wit: the application of the *Jackson v. Virginia* standard of review for legal sufficiency and the Court's reliance on "inference stacking" to reach its decision.

Because we find that the court of appeals applied the legal sufficiency test incorrectly, we remand the case to the court of appeals to reconsider the legal sufficiency of the evidence. Some courts of appeals, in their criminal law opinions, have cited a rule that when conducting a legal sufficiency review a vital fact may not be established by stacking inference upon inference. *E.g.*, *Reedy v. State, No. 03-03-0399-CR*, 2006 Tex. App. LEXIS 10484 at *49 (Tex. App.-Austin, Dec. 8, 2006, pet. filed); *Tippitt v. State*, 41 S.W.3d 316, 327 (Tex. App.-Fort Worth, 2001, no pet.); *Richardson v. State*, 834 S.W.2d 535, 537 (Tex. App.- Houston [1st Dist.] 1992; pet. ref'd).

However, inference stacking has not been used in this Court's sufficiency of the evidence jurisprudence in over 50 years. In the distant past, this Court reversed numerous convictions because they were based upon stacking inferences, unsupported presumptions, or building presumptions upon presumptions. *See*,

e.g., *Stallings v. State*, 158 Tex. Crim. 74, 77, 252 S.W.2d 939, 940 (1952); *Williamson v. State*, 156 Tex. Crim. 520, 522, 244 S.W.2d 202, 204 (1951); *Lee v. State*, 152 Tex. Crim. 401, 405, 214 S.W.2d 619, 622 (1948).

However, that practice was discontinued and is not a part of our modern sufficiency review.

We have used the *Jackson v. Virginia* test for legal sufficiency review since it was enunciated by the U.S. Supreme Court in 1979. *Jackson*, 443 U.S. 307. The only time that such language appears in a recent opinion from this Court is in a recitation of the grounds for review as stated by a party. *See Guevara*, 152 S.W.3d at 48. In that case, we overturned the court of appeal's reversal for legal insufficiency and held that the jury verdict was based on reasonable inferences from the evidence. *Id.* at 52.

The rule against inference stacking as used by the courts of appeals might have evolved from their civil cases. *See, e.g., Lozano v. Lozano*, 983 S.W.2d 787, 789 (Tex. App.-Houston [14th Dist.] 1998) ("[A] vital fact may not be established by stacking inference upon inference. *See Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968); *Engstrom v. First Nat. Bank*, 936 S.W.2d 438, 445 (Tex. App.-Houston [14th Dist.] 1996, writ. denied).").

Since the courts of appeals consider both civil and criminal cases, perhaps that is how the rule has made its way into their criminal law opinions. Our appellate law, however, contains no such rule, and we will not take this opportunity to import it into our criminal jurisprudence.

In the context of modern criminal law, a rule against inference stacking is unnecessary. Under *Jackson v. Virginia*, courts of appeals assessing legal sufficiency are to consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences there from, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Powell*, 194 S.W.3d at 506; *Guevara*, 152 S.W.3d at 49.

Under the *Jackson* test, we permit juries to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions. To correctly apply the *Jackson* standard, it is vital that courts of appeal understand the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption.

Inference stacking is not an improper reasoning process; it just adds unnecessary confusion to the legal sufficiency review without adding any substance. Rather than using the language of inference stacking, courts of appeals should adhere to the *Jackson* standard and determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. In conclusion the criminal court of appeals notes:

> "Because the court of appeals applied the Legal sufficiency standard incorrectly, we remand this case to the court of appeals to reconsider the legal sufficiency of the evidence supporting Appellant's conviction and for any further proceedings consistent with this opinion."

In this case, the legal insufficiency of the evidence argument is especially true because there were so many conflicted issues of fact in the evidence, unsupported presumptions, and there was also untrue testimony offered by the State from their witnesses as well as wrongfully excluded evidence by prosecutor, and contested fact issues regarding how the Appellant conducted his work at the St. Agnes School.

CONCLUSION

This Court should grant certiorari to ensure the Court of Appeals's compliance with the *Jackson* standard. Without this Court's intervention, the damage to the Texas criminal justice system will go unrepaired. The Texas Court of Criminal Appeals reversed numerous convictions because they were based upon stacking inferences, unsupported presumptions. Texas appellate law, however, contains no such rule. That practice was discontinued and is not a part of the Texas Criminal Court of Appeals's sufficiency review, yet the Court of Appeals continues to utilize this practice to reach its decision in the criminal cases. Thus the court of appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power . Therefore the appellant prays that this Court reverse the decision of the Court of Appeals, pursuant to Point Three or Point of Error One or Two. In the alternative, the Court should grant certiorari and schedule the case for briefing and oral argument.

Respectfully submitted,

/s/ Reza Ahmadi
Reza Ahmadi
Dated this the 26th day of February, 2011.

APPENDIX A- DECISION OF COURT OF APPEALS. DECIDED JANUARY 28, 2010

JUDGMENT

The Fourteenth Court of Appeals

REZA HAGHIGHI AHMADI, Appellant

NO. 14-08-00584-CR V.

THE STATE OF TEXAS, appellee

This cause on the transcript of the record of the Court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED** and that this decision be certified below for observance.

Affirmed and Memorandum Opinion filed January 28, 2010.

The Fourteenth Court of Appeals

REZA HAGHIGHI AHMADI, Appellant

NO. 14-08-00584-CR V.

THE STATE OF TEXAS, appellee

On Appeal from the 337th District Court

Harris County, Texas

Trial Court Cause No. 1118773

MEMORANDUM OPINION

Appellant Reza Haghighi Ahmadi was convicted of theft of property in an amount exceeding two hundred thousand dollars and sentenced to seven years imprisonment. In three issues, appellant challenges the legal and factual sufficiency of the evidence and the trial court's explanation to the jury of the "beyond a reasonable doubt" standard. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was indicted along with Nereo Garza for three counts of theft of property allegedly occurring pursuant to a scheme and continuing course of conduct lasting from June 2003-Auguest 2005. The State alleged that appellant and Garza sought to unlawfully obtain money from three complainants: Dennis Leahy as representative of Compaq/Hewlett Packard ("HP"), Michael Cole as representative of Safeware Insurance Agency ("Safeware"), and Jason Hyams as representative of St. Agnes Academy ("St. Agnes").[1]

In late 2000, St. Agnes implemented a program through which each incoming student class would purchase a laptop for school use. For the first three years of the program, students purchased laptops from HP. HP provided a four-year manufacturer's warranty for each computer, and Safeware offered optional supplemental insurance policies to cover any repairs not covered by HP's warranty. Shortly after the program began, St. Agnes hired Garza as a network and software technician and assigned him to the "C.A.V.E.,"[2]

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1 St. Agnes is an all-girls' preparatory school located in Houston.

2 C.A.V.E. is an acronym for Computer Audio Visual Equipment

the school's computer repair center. Shortly before the 2003-2004 school year began, a massive computer virus attack infected a majority of the students' laptops. Garza pushed the school to hire appellant's business. Intelligent Interface ("I.I."), to repair the computers. Appellant agreed to send I.I. technicians to fix the laptops, and the repairs were completed after approximately three weeks of work. Appellant did not charge the school for this repair work. St. Agnes subsequently secured I.I. as its HP warranty repair provider, and appellant began assigning I.I. technicians to work in the C.A.V.E. full-time.

In 2005, St. Agnes hired Jason Hyams as its technology director. Hyams soon become concerned with Garza's activities in the C.A.V.E. He questioned the presence of large inventory of replacement parts for which there were no invoices or documentation, and also discovered that Safeware checks made payable to St. Agnes were habitually deposited into bank accounts managed by I.I. and a business account maintained in Garza's wife's name. Additionally, Hyams found lists of laptop serial numbers. Part numbers, and part descriptions organized sequentially by date.

He found several instances where parts were ordered and received for specific laptops without

corresponding service tickets or student complaints matching the part orders. After comparing the laptop serial numbers with a list of student identification numbers, Hyams determined that the list were arranged in alphabetical order by student name. Hyams concluded that Garza was ordering excess parts from HP by rotating laptop serial numbers every two months.

St. Agnes questioned appellant and Garza about the alleged rotation scheme and the replacement part inventory. At that time, Garza admitted making unnecessary part replacements. Appellant and Garza both told the school that they maintained the parts inventory so that repairs could be completed more quickly. Garza did not respond when the rotation scheme was addressed, but Appellant consistently denied any knowledge of the scheme. St. Agnes terminated Garza's employment after questioning and later severed its relationship with I.I. St. Agnes also notified HP, Safeware, and the police of its concerns.

Appellant and Garza were subsequently arrested and indicted for theft. The two men were tried jointly, and the jury convicted appellant of theft against Leahy and acquitted him of the charges against Cole and Hyams. Appellant was

sentenced to seven years' imprisonment and assessed a $5,000 fine.

Appellant raises three issues on appeal. In his first and second issues, appellant contends the evidence is legally and factually insufficient to sustain his conviction. Appellant's third issue alleges that the trial judge's statement during voir dire while discussing the "beyond a reasonable doubt" standard impermissibly lowered the State's burden of proof.

II. SUFFICIENCY OF THE EVIDENCE

a. Standards of Review

In conducting a legal sufficiency review, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Salinas v. State*, 162 S.W.3rd 734, 737 (Tex. Crim App. 2005). We do not ask whether we believe the evidence at trial established guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). We may not re-weigh the evidence and substitute our judgment for that of the trier of fact. *King V. State*, 29 S. W. 3d 556, 562 (Tex. Crim. App. 2000). In our review, we accord great deference "to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony. To weigh the

evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Clewis V. State*, 922 S. W.2d 126, 133 (Tex. Crim. Ap. 1996) (quoting *Jackson*, 443 U.S. at 319). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id.* At 133 n.13 In evaluating the factual sufficiency of the evidence, we view all the evidence in a neutral light and will set aside the verdict only if we able to say, with some objective basis in the record, that the conviction is clearly wrong or manifestly unjust because the great weigh and preponderance of the evidence contradicts the jury's verdict. *Watson V. State*, 204 S. W.3d 404, 414-17 (Tex. Crim. App. 2006). We cannot order a new trail simply because we disagree with the jury's resolution of a conflict in the evidence, and we do not intrude upon the fact-finder's role as the sole judge of the weight and credibility of witness testimony. See *id.*vat 417; *Fuentes V. State*, 991 S. W. 2d 267, 271 (Tex, Crim. App. 1999). The fact-finder may choose to believe all, some, or none of the testimony presented. *Chambers V. State*, 805 S. W.2d 459. 416 (Tex. Crim. App. 1991); *In re A.B.*,133 S. W.3d 869, 872 (Tex. App.-Dallas 204. No pet.). In our review, we discuss the evidence appellant contends in most

important in allegedly undermining the jury's verdict. *Sims V. State*, 99 S. W.3d 600, 603 (Tex. Crim. App. 2003). We must explain in exactly what way we perceive the conflicting evidence to greatly preponderate against conviction if we determine the evidence is factually insufficient. *Watson*, 204 S. W.3d at 414-17.

b. Analysis

Appellant contends the evidence is legally and factually insuffucuent to support his conviction because it failed to show he intentionally engaged in fraud or theft either individually or as a party with Garza. A person commits theft if he unlawfully appropriates property with intend to deprive the owner of property. TEX. PENAL CODE ANN. § 31.03(a) (Vernon Supp. 208). A person acts with intend with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cuase the resuly. *Id* § 6.03 (a) (Vernon 2003). Intend is a question of fact for the jury. *Reed V. State*, 158 S. W.3d 44, 48 (Tex. App.-Houston [14th Dis.] 2005, pet. ref'd). Intend is almost always proven through evidence of the circumstances surrounding the crime. *Childs V. State*, 21 S. W.3d 631, 635 (Tex. App.-Houston [14th Dist.] 2000, pet. ref's). Circumstances evidence is as probative as direct evidence in

establishing guilt and is alone sufficient to establish guilt. *Guevara V. State*, 152 S. W.3d 45, 49 (Tex. Crim. App. 2004). Intend may be inferred from the words, acts, and conduct of the accused, or from any fact that tends to prove its existence. *See Smith V. State*, 965 S. W.2d 509. 518 (Tex, Crim. App. 1998); *Christensen V. State*, 240 S. W. 3d 25, 32 (Tex. App.-Houston [1st Dist.] 2007, pet. ref's); *Reed*, 158 S. W. 3d at 48.

Under the law of parties, a person is criminally responsible for the conduct of another if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(A) (2) (Vernon 2003). Circumstantial evidence alone may be sufficient to show the defendant was a party. *David V. State*, 195 S. W.3d 311, 320 (Tex. App. Houston [14th Dist.] 2006, no pet.). The circumstantial evidence must show that at the time of the offense, the parties were acting together and that party somehow contributed to the execution of their common purpose. *King V. State*, 17 S. W.3d 7, 15 (Tex. App.-Houston [14th Dist.] 2000, pet. ref'd). The jury may infer an agreement among a group working on a common project when each person's action is consistent with realizing a common goal. *Jarnigan V. State*,

57 S. W.3d 76,87 (Tex. App.-Houston [14th Dist] 2001, pet. ref'd). In determining whether the defendant participated as a party, we review the events occurring before, during, and after the commission of the offense. *Powelll V. State*, 194 S. W.3d 503, 507 (Tex. Crim. App. 2006); *Duvall V. State*, 189 S. W.3d 828, 831 (Tex. App.-Houston [1st Dist] 2006, pet. ref's).

The record establishes that Garza contacted appellant sometime in early 2003 and the two men agreed to make I.I. the HP warranty repair provider for student laptops at St. Agnes. As part of this arrangement, appellant agreed to pay Garza a 19% "commission" for any HP warranty repairs performed by Garza in the C.A.V.E.[3] Appellant and Garza never disclose this agreement to any other party, and appellant never offered I.I. employees working at S. Agnes a similar incentive opportunity. Appellant's first commission check to Garza was dated before the virus attack, but St. Agnes's officials testified that I.I. was not affiliated with the school until after I.I. fixed the students' computers. From this evidence, the jury could infer that the agreement between

3 Appellant paid Garza over $171,000 in commissions from June 2003-August 2005, while Garza's total salary from St. Agnes during this time period was roughly $80,000.

appellant and Garza, apparently made without St. Agnes's permission, laid the framework for their scheme to unlawfully obtain money from HP. *See Powell*, 194 S. W.3d at 507 (allowing the consideration of events occurring before the offense in determining whether the defendant participated as a party); *King*, 17 S.W.3d at 15 (listing acting together as one factor in determining whether individuals are parties to an offense).

Appellant was paid for repair work performed at St. Agnes through a labor reimbursement program administered by HP. Throughout his relationship with St. Agnes, appellant was entitled to HP's highest labor reimbursement rate due to his status as a "premier" certified warranty representative.[4] Appellant was required to comply with several requirements in order to maintain this status, including submitting only one warranty part order per thirty days for any individual laptop serial number and allowing only HP certified technician to order parts and perform

4 HP created a certification process whereby warranty repairs providers could obtain different levels of reimbursement for labor time. Providers in each certification level were reimbursed a different amount for labor. From 2003-2005, HP reimbursed appellant $761,552.50 for labor and provided I.I. with $2,496,958 in parts associated with St. Agnes.

repair work for warranty claims.

One witness testified that appellant informed Garza that he could not submit more than one student claim per month. Christopher Cardenas, the I.I. employee responsible for ordering parts for St. Agnes, stated that he was alerted on multiple occasions by HP's ordering system that warranty orders were being made for individual laptops more than once every thirty days. After asking appellant how to proceed, he was told to "call [Garza] and tell him he cannot order on that serial number." Garza would then either provide a different serial number to use or tell Cardenas to forget about ordering for that particular computer.

From this evidence, the jury could reasonably infer that both appellant and Garza were contributing to the execution of a common purpose. See *Jarnigan*, 57 S. W.3d at 87 (jury may infer agreement when each person's actions are consistent with reaching a common goal); *King*, 17 S. W.3d at 15. Garza's employment by St. Agnes allowed access to HP computers while appellant's relationship with HP provided an opportunity to obtain money through labor reimbursements.

Under the reimbursement process, appellant would obtain more money through his premier status by ordering more parts than were needed. The jury could infer that appellant knew of

Garza's rotation scheme after hearing that appellant was aware that Garza often changed serial numbers after being notified that more then one claim had been made on individual laptops during the previous thirty days, a practice appellant had informed Garza was improper. The manner in which appellant and Garza ordered parts from HP also supports a finding that appellant had knowledge of the rotation scheme. Appellant assigned Daniel Pham to work as a full-time HP warranty repair technician in the C.A.V.E. Because Pham was a certified technician, he would typically be the individual responsible for diagnosing problems, ordering parts, and performing repairs. He stated that appellant instructed him to "just listen to whatever [Garza] told me to do." Appellant denied giving this instruction. Roughly six months after Pham began working at St. Agnes, Garza began performing diagnostic work and performing waranty repairs, despite not being an HP certified technician. Pham stated that, over time, he began questioning the amount of repairs being made and believed that he was replacing parts that did

not need to be replaced.[5]

According to Pham, Garza would write down part orders on tablets and send them to Cardenas, who in turn ordered the requested parts from HP. Cardenas testified that appellant gave the impression that Garza was in charge of I.I.'s work at St. Agnes. He stated that he ordered parts for St. Agnes based on the lists Garza emailed or faxed to him. These list often provided no diagnostic reports. Cardenas would call Garza and ask for this information, and Garza would provide a few student complaints, but no diagnostics for the issue. Cardenas would then "enter whatever [diagnostic code HP] provided to get close to whatever that problem [was]," and admitted that he often entered diagnostic information after "guessing" the nature of the

5 The number of HP warranty claims submitted from St. Agnes decreased dramatically once Garza's employment was terminated. According to Hyams's testimony, St. Agnes submitted approximately 1300 warranty claims after Garza's dismissal as compared to over 3,000 claims under Garza during 2005. Pham also stated that the number of warranty repairs decreased substantially once Garza stopped working for the school. Appellant argues the number decreased because the school switched to more reliable IBM laptops; however, there were still students using HP computers after Garza's dismissal.

issue.[6]

Cardenas stated that appellant knew orders were being placed based on Garza's tablet sheets, but did not believe that appellant knew of the rotation scheme. But, when questioned by the State, Cardenas agreed that appellant knew how Garza's ordering system worked "every step of the way". Garza also testified that he "[k]ept [appellant] in the loop about how business was going" and what he was doing at St. Agnes.

Dennis Leahy, an HP security investigator, testifies that I.I.'s ordering process was "highly unusual." He stated that, typically, a certified HP repair technician would perform a diagnosis and write up a worksheet containing detailed information about the repair, including "the customer's name, time, date, diagnosis, what part is needed, [and] what model number the computer

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6 The State provided Cardenas with one of Garza's lists-which contained no diagnostic information-in which Garza placed twenty-eight parts orders. Cardenas stated that rather than asking Garza for diagnostic information for each part. He simply inquired about the diagnostics for three or four parts and then filled in the diagnostic information for the remaining parts on his own.

is,"[7] Then, either the technician or an authorized clerical administrator would enter a diagnosis for each part ordered. The evidence shows that I.I. did not follow this procedure when submitting part orders for St. Agnes. Additionally, a warranty claim compliance manager for HP testified that I.I. filed warranty claims on several laptops after Safeware provided funds to replace the computers. Garza admitted that he placed part order through I.I. for laptops not covered by HP's warranty, and he also informed police that he fabricated or falsified many of St. Agnes's repair orders. These false claims were passed on to I.I. who in turn submitted them to HP to obtain reimbursement.

The jury could consider this evidence and infer that appellant was an active participant in Garza's rotation scheme. Garza pushed for St. Agnes to hire I.I. to repair the computer virus, and appellant decided not to charge the school for completing the repairs.Pham and Cardenas stated that appellant and Garza discussed

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7 On at least one occasion, HP conducted an independent investigation due to the high number of claims and lack of documentation related to St. Agnes's computers. Appellant told HP that the high number of claims was due to the student environment. HP instructed appellant to provide more thorough information in his future orders.

business nearly every day, and Garza stated that appellant was fully aware of his activities in the C.A.V.E. The testimony shows that appellant knew Garza was performing diagnosis work and making warranty repairs despite not being an HP certified technician. The jury could also infer this knowledge from appellant's commission payments to Garza. The rotation scheme allowed appellant to receive extra reimbursement from HP for unnecessary part orders and repairs. The jury could thus properly conclude that appellant and Garza were parties to a scheme to improperly obtain money from HP. *See Davis*, 195 S. W.3d at 320 (stating circumstantial evidence alone may be sufficient to prove party status); *see also Powell*, 194 S. W. 3d at 507 (recognizing the "cumulative force" of all the circumstantial evidence can be sufficient to establish the accused's guilt beyond a reasonable doubt).

Appellant also argues that his genuine surprise at being questioned about the rotation scheme and his full cooperation once the scheme was investigated is evidence of lack of complicity. Multiple witnesses testified that appellant genuinely surprised when confronted with the rotation scheme. However, there is evidence that appellant did not cooperate fully with investigators. For example, appellant failed to

provide HP with proof of ownership of the large parts inventory at St. Agnes. He also did not disclose the commission agreement to the police after being asked whether he gave anything of "value" to Garza. His only disclosure was that he provided Garza with rodeo tickets on one occasion.

Appellant also argues he did nothing untoward because he reported Garza's commission payments to the Internal Revenue Service on 1099 forms. But a certified fraud specialist testified that filling a 1099 form is not always evidence that payments are legal and above-board. After hearing this testimony, the jury could have reasonably concluded that appellant's behavior after being confronted by investigators was inconsistent with his innocence. *See Chambers*, 805 S. W.2d at 461 (allowing the fact-finder to believe all, some, or none of the testimony given at trial).

Viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could find that appellant was a party to a scheme to commit theft and that he intentionally committed the essential elements of the charged offense beyond a reasonable doubt. Having neutrally reviewed the entire record, including the evidence appellant claims is most important

in allegedly undermining the jury's verdict. We cannot say that the evidence preponderates against conviction is clearly wrong or manifestly unjust. Accordingly, we find the evidence legally and factually sufficient to sustain appellant's conviction and overrule appellant's first and second issues.[8]

III. TRIAL JUDGE'S DESCRIPTION OF REASONABLE BOUDT DURING VOIR DIRE

In his third issue, appellant argues that the trial court's explanation of proof beyond a reasonable doubt during voir dire diminished the State's burdon of proof by allowing the Jury to formulate a less demanding standard of determining guilt than is constitutionally allowed. During voir dire, the trial judge stated that the State bore the burden of proving the elements of each offense beyond a reasonable doubt. The Judge continued:

> Here's the deal on reasonable doubt. The Court is not going to – not only here but anywhere else in this State – is not going to

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8 Because we determine the evidence was sufficient to convict appellant as a party, we need not discuss whether it was sufficient to convict him as a primary actor. *See Guevara,* 152 S. W.3d at 49 ("[W]hen the trial court's charge authorizes the jury to convict on more than one theory...the verdict of guilty will be upheld if the evidence is sufficient on any one of the theories.")

> define for you what a reasonable doubt is. The Court of Criminal Appeals has told us that is up to each individual juror to decide in his or her own mind so that this juror gets to decide, this juror gets to decide, this juror gets to decide through all 12 of you. There's not going to be a light, no buzzer, no whistle, nothing that goes off to say, okay, the State has met its burden. It's up to you to decide when you are convinced beyond a reasonable doubt as to each element of the offense

The judge then explained that "the State does not have to prove its case beyond all doubt" and reiterated that, in order to convict, each juror must convinced beyond a reasonable doubt that the State established each element of the offense. Appellant asserts it was improper for the trail judge to "tell each juror that he or she can define the State's burden of proof by his or her own standard."

Appellant acknowledges on appeal that his counsel did not object to the trial judge's voir dire statements. Generally, counsel must object to a trail judge's discussion of the reasonable doubt standard in order to preserve error. *See Fuentes*, 991 S. W.2d at 273 (finding appellant waived his

complaint by failing to object each time the trial judge discussed the reasonable doubt standard). Appellant cites *Blue V. State*, 41 S. W.3d 129 (Tex. Crim. App, 2000) (plurality op.) for the proposition that a defendant need not always object to voir dire statements to preserve error. In *Blue*, a plurality of the Court of Criminal Appeals ruled that in certain circumstances a judge's voir dire statements could "tint[ ] appellant's presumption of innocence in front of the venire, [become] fundemental error of constitutional dimension and require [ ] no objection." [9] *Id.* at 132. As a plurality opinion, *Blue* is not binding precedent ,. *See Murchison V. State*, 93 S. W. 3d 239, 262 (Tex. App.-Houston [14th Dist] 2002, pet. ref's). Even if Blue were binding, the trial judge's statements in this case were not so serious as to taint the presumption of innocence and obviate appellant's need to object, as discussed below.

Reasonable doubt is a simple term which jurors are presumed to know in order to answer the question of guilt asked of them. *Dickerson V. State*, 740 S. W.2d 567, 572 (Tex. App.-Fort Worth

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9 The *Blue* trail court apologized to potential jurors for a long delay, explained that the delay was caused by the defendant's inability to decide whether to accept a plea bargain, and expressed its preference that the defendant enter a plea of guilty. *Id* at 130.

1987. Pet. ref'd). Each juror must individually decide what amount of proof constitutes beyond a reasonable doubt. Murphy V. State. 112 S. W.3d 592, 597 (Tex. Crim. App. 2003). There is nothing unlawful about differing thresholds of reasonable doubt among jurors. *See Garrett V. State*, 851 S. W.2d 853, 859 (Tex. Crim. App.1993). Here, the trial judge's explanation of reasonable doubt required a presumption of innocence until the State me its burden of proof. The judge's voir dire statements and the jury charge placed the burden of proof squarely on the State. Each potential juror was correctly instructed that they would be required to determine whether the State proved each element of the offenses beyond a reasonable doubt. Thus the trail judge's comments did not taint appellant's presumption of innocence and create an impermissibly low standard for finding guilt beyond a reasonable doubt. Therefore, appellant waived error by failing to object to the trial judge's statements. *See* TEX.R.App. P.33.1; *Fuentes*, 991 S. W.2d at 273; see also *Rodriguez V. State*, No. 14-07-00618-CR, 2008 WL 4915814, at *4 (Tex. App.-Houston [14th Dist.] Nov. 18, 2008 pet. ref'd) (mem. Op., not designated for publication) (holding that appellant waived error by failing to object to the trial court's definition of reasonable doubt to the venire).

We overrule appellant's third issue.

IV. CONCLUSION

Having determined that the evidence was legally and factually sufficient to support the jury's verdict and that the trail court did not diminish the State's burden of proof by its voir dire statements concerning reasonable doubt, we overrule appellant's three issues and affirm the trail court's judgment.

/s/ Leslie B. Yates

Justice

Panel consists of justices Yates, Frost, and Brown.
Do Not Publish – TEX. R. App.P.47.2(b)

APPENDIX B - ORDER OF COURT OF APPEALS DENY REHEARING.
DECIDED MARCH 11, 2010

The Fourteenth Court of Appeals

REZA HAGHIGHI AHMADI, Appellant

NO. 14-08-00584-CR V.

THE STATE OF TEXAS, appellee

On this date The Appellant's motion for a rehearing is denied.

/s/ Leslie B. Yates

Justice

Panel consists of justices Yates, Frost, and Brown.
Do Not Publish – TEX. R. App.P.47.2(b)

APPENDIX C - DECISION OF STATE TRIAL COURT DECIDED 6/25/2008

Case No. 1118773

INCIDENT NO./ TRN: 9038390955A003

The State of Texas	§	**In the 337th District**
	§	
v.	§	**Court**
	§	
AHMADI, REZA HAGHIGHI	§	**Harris County, Texas**
	§	
	§	
State ID No.: Unknown	§	

JUDGMENT OF CONVECTION BY JURY

Judge Presiding:	Date Judgment Entered:
Hon. **DON STRICKLIN**	**6/25/2008**

Attorney for State: **KATE DOLAN**

Attorney for Defendant: **DANNY EASTERLING**

Offense for which Defendant Convicted:

THEFT >=200,000

Charging Instrument:	Statute for Offense:
INDEICTMENT	**N/A**

Date of Offense:

6/2/2003-8-30-2005

Degree of Offense:	Plea to Offense:
1ST DEGREE FELONY	**NOT GUILTY**

Verdict of Jury:	Finding on Deadly Weapon:
GUILTY	**N/A**

Plea of 1st Enhancement Plea to 2nd Enhancement Paragraph: **N/A** /Habitual Paragraph: **N/A**

Finding of 1st Enhancement Finding to 2nd Enhancement Paragraph: **N/A** /Habitual Paragraph: **N/A**

Punished Assessed by: **JURY**

Date Sentence Imposed: **6/25/2008**

Date Sentence to Commence: **6/25/2008**

Punishment and place of Confinement: **7 YEARS INSTITUTIONAL DIVISION, TDCJ**

This Sentence should run **CONCURRENTLY.**

□ Sentence of Confinement Suspended, Defendant Placed on Community Supervision for **N/A**

Fine: **$5,000** Court Cost: **$345.00** Restitution **$N/A** Restitution Payable to: □VICTIM □AGENCY

Sex Offender Registration Requirements do not apply to the Defendant. Tex Code Crim Proc. Chapter 62.

The age of the victim at the time of offense was **N/A**

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited: From 6/6/2007 to 6/14/2007
From 6/24/2007 to 6/25/2007

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A DAYS NOTES: N/A

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in Harris County, Texas. The State appeared by her District Attorney.

Counsel / Waiver of Counsel (Select One)

X Defendant appeared in person with counsel.

□ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury

as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and ORDERED it entered upon the minutes of the Court.

Punishment Assessed by Jury / Court / No election (select one)

X **Jury.** Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open Court, it returned its verdict as indicated above.

□ **Court.** Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assess Defendant's punishment as indicated above.

□ **No Election.** Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the court assessed Defendant's punishment as indicated

above.

The court FIND Defendant committed the above offense, and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court FINDS the presentence Investigation, if so ordered, was done according to the applicable provisions of Tex. Code Crim. Proc. Art. 42.12. § 9.

The Court Orders Defendant punished as indicated above. The Court ORDERS Defendant to pay all fines, court costs, and restitution above.

Punishment Options (select one)

X **Confinement in State Jail or Institutional Division.** The Court Orders the authorized agent of the State of Texas or the sheriff of this County to take, safely convey, and deliver Defendant to the Director, Institutional Division, TDCJ. The Court Order Defendant to be confined for the period and in the manner indicated above. The Court Orders Defendant remanded to the custody of the sheriff of this county until the sheriff can obey the direction of this sentence. The Court Orders that upon release from confinement, Defendant proceed immediately to the **Harris County District Clerk's Office.** Once there, the Court Orders Defendant to pay, or make arrangements to pay, any remaining unpaid fines, court costs, and

restitution as orders by the Court above.

□ **County Jail – Confinement / Confinement in Lieu of payment.** The Court orders Defendant immediately committed to custody of the sheriff of Harris County, Texas on the date the sentence is to commence. Defendant shall be confined in the Harris County Jail for the period indicated above. The Court orders that upon release from confinement, Defendant shall immediately proceed to the Harris County District Clerk's Office. Once there, the Court Orders Defendant to pay or make arrangement to pay, any remaining unpaid fines, court costs, and restitution as ordered by the Court above.

□ **Fine Only Payment.** The punishment assessed against Defendant is for FINE ONLY. The Court Orders Defendant to proceed immediately to the **Office of the Harris County**. Once there, the Court Orders Defendant to pay or make arrangement to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of sentence (select one)

X The Court ORDERS Defendant's sentence **Executed.**

□ The Court Orders Defendant's sentence of confinement Suspected. The Court Orders Defendant placed on community supervision for the adjudged period (above) so long as Defendant

abides by and does not violate the terms and conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court Orders that Defendant is given credit noted above on this sentence for the time spent incarcerated.

Furthermore, the following special findings or orders apply:

Signed and entered on June 25, 2008

/s/ Don Stricklin
Judge Presiding

Notice of Appeal Filed: JUL 02 2008
Clerk: D Bernard

APPENDIX D - DECISION OF TEXAS COURT OF CRIMINAL APPEALS REFUSED DISCRETIONARY REVIEW. DECIDED ON OCTOBER 6, 2010

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O.BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

WEDNESDAY, OCTOBER 6, 2010
RE: CASE NO. PD-0431-10
COA# 14-08-00584-CR
STYLE: AHMADI, REZA HAGHIGHI

On this date, the Appellant's motion for discretionary review was refused.

/s/ Louise Pearson, Clerk

DANNY K. EASTERLING
ATTORNEY AT LAW
1018 PRESTON SIXTH FLOOR
HOUSTON, TEXAS 77002-1877

APPENDIX E - ORDER OF TEXAS COURT OF CRIMINAL APPEALS REJECTING REHEARING DECIDED ON OCTOBER 25, 2010

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O.BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

WEDNESDAY, OCTOBER 25, 2010
RE: CASE NO. PD-0431-10
COA# 14-08-00584-CR
STYLE: AHMADI, REZA HAGHIGHI

On this day, the Appellant's motion for rehearing was rejected for non-compliance with Rule 79.2(2) T.R.A.P.

/s/ Louise Pearson, Clerk

DANNY K. EASTERLING
ATTORNEY AT LAW
1018 PRESTON SIXTH FLOOR
HOUSTON, TEXAS 77002-1877

APPENDIX F - AN EXTENSION OF TIME TO FILE THE PETITION FOR A WRIT OF CERTIORARI WAS GRANTED ON NOVEMBER 18, 2010

FOURTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

RE: Case No. 14-08-00584-CR

Style: Reza Haghighi Ahmadi
v. The State of Texas

Please be advised that on this date the Court GRANTED appellant's motion stay issuance of mandate in the above cause, issuance of mandate stayed for 90 days.

T.C. Case # 1118773

/s/ CHRISTOPHER A. PRINE, CLERK

DANNY K. EASTERLING
ATTORNEY AT LAW
1018 PRESTON SIXTH FLOOR
HOUSTON, TEXAS 77002-1877

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(2)

Supreme Court, U.S.
FILED
APR 20 2011
OFFICE OF THE CLERK

NO. 10-1071

IN THE

Supreme Court of the United States

Reza Ahmadi

Appellant, *Petitioner,*

VS.

THE STATE OF TEXAS

Appellee, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

PETITION FOR REHEARING

Reza Ahmadi

Pro Se

7302 Wooded Valley Dr.

Houston, Texas 77095

713-973-7393

LIST OF PARTIES

Danny K. Easterling 1018 Preston, 6th Floor Houston, TX 77002	Appellant's counsel at trial and on appeal
Hon. Patricia Lykos 1201 Franklin, Suite 600 Houston, TX 77002	Harris County District Attorney
Kate Dolan	Assistant District Attorney
Hon. Don Stricklin	Judge of the 337th District Court, Harris County, Texas

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IN THE

Supreme Court of the United States

NO. 10-1071

Reza Ahmadi, Appellant, *Petitioner,*

VS.

THE STATE OF TEXAS

Appellee, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

PETITION FOR REHEARING

Petitioner [referred to herein as "Ahmadi"] submits this petition for rehearing pursuant to this Court's Rule 44.2 because of "intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented". Ahmadi filed Petition for Writ of Certiorari (Docket Case No. 10-1071) on January 5, 2011. Certiorari was denied by this Court on April 4, 2011.

STATEMENT OF THE CASE

An indictment in Cause Number 1118773, filed in the 337th District Court of Harris County, accused Ahmadi of Theft in an amount over $200,000, alleging Dennis Leahy as the victim (CR-2).[1] Also indicted, and tried together with Ahmadi, was Nereo Garza. A jury found Ahmadi guilty as charged (CR -58, RR IX-4). The jury assessed punishment at confinement for seven years in the Texas Department of Criminal Justice, Correctional Institutions Division, plus a $5000 fine (CR-65). Ahmadi gave timely notice of appeal (CR-70). The appellant presented three points of error. The Court of Appeals affirmed the judgment of the trial court in a memorandum opinion. A motion for rehearing was overruled. Pursuant to an extension of time, the appellant timely filed a petition with the Texas Court of Criminal Appeals for discretionary review. This Court refused discretionary review on October 6, 2010. Appellant filed a Motion for Rehearing of Appellant's Petition for Discretionary Review. This motion was rejected on October 25, 2010. The Court of Appeals

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1 The clerk's record in Cause Number 1118773 is designated as "CR I." The reporter's record from the consolidated trial of Ahmadi and Garza is designated "RR."

extended the time for filing a petition for writ of certiorari with the United States Supreme Court.

GROUNDS FOR REHEARING

This prosecution arose from an allegation that Ahmadi, who was the owner of a computer repair company, stole money from Hewlett Packard through the administration of a computer repair contract for the St. Agnes School in Houston.[2] Ahmadi and Nereo Garza were tried together, and each was convicted.

The appellant maintains that the evidence was legally insufficient to show that he had intent to defraud anyone, either at the School or at Hewlett Packard. The evidence failed to show that Ahmadi was aware of, let alone promoted, any theft by codefendant Garza, who controlled the day-to-day repair operation and the related paperwork.

The appellant –petitioner seek petition for Rehearing of all four issues presented, for reasons set forth below.

A. Cause in Fact and Proximate Cause

In most cases, the applicable standard of legal causation is "proximate cause." For violation of the Texas Deceptive Trade Practices Act and

2 The named complainant, Dennis Leahy, was a security official for HP.

selling defective products, the applicable standard of legal causation is "producing cause."
In Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 45 (Tex.2007).The court held that the proper definition of "producing cause" is "that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred."
The HP defective laptops caused the injury or revenue loss to itself or another. In other words, the defective laptops were a "cause in fact" of the injury. However, the Defendant is also arguing that the defective laptops were the "proximate" or "legal" cause of the injury.
Defendant provides that the negligent conduct of HP is a:

.....legal cause of harm to itself and to another if

(a) HP's conduct is a substantial factor in bringing about the harm, and

(b) There is no rule of law relieving the actor from liability because of the manner in which HP's negligence has resulted in harm, economic loss to itself or another

Intervening and Superseding Cause

The defendant argues that there has been an intervening and superseding cause.
An "intervening force is one which actively

operates in producing harm to self or another after the actor's negligent act or omission has been committed. The intervening cause must also be superseding.

For example, if a seller further along the chain of distribution is negligent for failing to make an inspection that seller's liability does not absolve the manufacturer from having to make its own product inspection. *See Vandermark v. Ford Motor Co.* 391 P2d 168 (Cal 1964), automobile manufacturer no absolved of liability for negligent even though the dealer had the final duty to inspect for defects in the car. However, if a seller does make an inspection, discovers a manufacturing defect, and yet does nothing either to correct the problem or to warn public, many courts hold that the seller's conduct is so gross that it is an intervening and superseding cause. The manufacture would not be liable in such a situation. *See Mc Laughlin v. Mine Safety Appliances Co.* 181 NE2d 430 (NY 1962).

Similarly, in this case HP a manufacturer and seller of laptop computers, sold laptops to St. Agnes Academy High School in late 2000. Intelligent Interface "I.I." a warranty dealer for HP, further along the chain distribution was brought into the St. Agnes for supporting HP's laptops repairs. After defendant was brought into

the account, defendant observes the high repair, defendant visits similar private high schools with the same laptop program, defendant discovers the same or worse problem. Defendant testified that the laptops at other schools were stacking this high awaiting for parts for repair [3].

Defendant detects the defects, informs HP of his observation on the laptop issues [4].

In a few months into supporting the laptop program, defendant realized the seriousness of the problem at St. Agnes.

The defendant took the initiatives by contacting IBM via email that reads: "The situation and crisis at the St. Agnes School due to the HPs' high defective rate is getting worse", and "requested for IBM to get involved". IBM did get involved and took the account over. Once IBM laptops were deployed the School environment started to change.

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3 Ahmadi had said an HP audit showed other places having more claims than St. Agnes did (RR IV-27).

4 Garza, co-defendant said Keevin Lee talked to Garza as part of an investigation to see "why there were a lot of schools being replacing [sic] top, bottoms, hinges. Because they had a problem with a recall with the LCD screens breaking the top and bottom cover" (RR VIII- 113-114).

Warranty Claims Analysis at St. Agnes...
The number of HP warranty claims submitted from St. Agnes decreased dramatically from 3000 during Garza to 1300 after Garza's dismissal[5].
In 2005 Garza was dismissed during the summer and worked only for 6 months in that year;
(During Garza, 130 days, he claimed 3000) $\simeq$ 23/day
(Thereafter, 108 days School claimed 1300) $\simeq$ 12/day
IBM report shows, I.I. provided warranty service at St. Agnes for an average of $\simeq$ 2/day
The increase warranty claims from "2, IBM" to "12, Compaq" is 10 per day after Garza's dismissal.
Increase /original = 10/12 = 84%. Therefore, Compaq had 84% higher breakage rate than IBM after Garza's dismissal. The 84% breakage rate does not stand to the 6% average industry standard [6].

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5 Court of Appeals noted: "The number of HP warranty claims submitted from St. Agnes decreased dramatically once Garza's employment was terminated. According to Hyams's testimony, St. Agnes submitted approximately 1300 warranty claims after Garza's dismissal as compared to over 3,000 claims under Garza during 2005. Pham also stated that the number of warranty repairs decreased substantially once Garza stopped working for the school. Appellant argues the number decreased because the school switched to more reliable IBM laptops; however, there were still students using HP computers after Garza's dismissal. Appx. A. P.14-a

6 To regulate the acceptability of defects and to protect the end user, ISO have created a standard for manufactures to follow ISO 13406-2. All reputable manufactures conform to and support the ISO 13406-2 standard.

"Yet HP sold laptops to St. Agnes but never informed St. Agnes on the defectives [7] despite IBM substitution, nor did HP questioned St. Agnes on the high number of claims submission [8]"

Defendant's act by engaging IBM to replace HP disastrous products in early 2004, and supporting School with nearly one million dollars worth of staff services work, providing inventory parts, at no charge to school, compare to HP, that it did investigate the breakage with laptops,

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7 Cheryl Barr testified that she worked for Intelligent Interface, developing marketing programs (RR VII- 176-177). This brought her into contact with officials at St. Agnes and other schools, and they discussed the fact that schoolchildren "were less careful" with computers than adult users were and there would be a higher repair rate (RR VII-178).

8 Rose Ann Cook the supervisor over Garza testified that she never got any complaints from Compaq or HP about any problems with parts orders (RR V- 80-81).

No one came out from HP to explain that Garza and Pham were doing anything wrong at the C.A.V.E. (RR VI-65).

Jenny Theiss, "the warranty claims compliance" section of HP, told Cardenas in 2003 that more detailed reports were needed regarding the St. Agnes account, and Theiss insisted that "It was Intelligent Interface's responsibility" (RR VI-205). The question of who actually filled out the orders at St. Agnes were "not my concern," Theiss said, and she admitted that she did not know who actually filled them out (RR VI-206). Theiss said her concern was whether Intelligent Interface "met the terms and conditions" of its contract with HP (RR VI-205).

discovered laptop defects [9], and yet did nothing either to correct the problem by removing or replacing the units or to warn St. Agnes. Accordingly, Ahmadi argues that HP, the manufacture and seller's conduct is so gross that it is an intervening and superseding cause[10]. Regarding appellant relationship with Compaq and HP, Ahmadi said he was never told that his firm was doing anything wrong (RR VII-203). Meaning Compaq approved the daily parts submission, Compaq approved the payment for all the work done by I.I., Compaq did not warn or suspend services with I.I. Instead as defendant testified: Compaq awarded Intelligent Interface with All Star Plaque on many occasions during this time period, with letters of recognition that

9 Keevin Lee the HP "partner service delivery manager" told Theiss, that the particular Compaq computer provided to St. Agnes students had "a lot of defects, characterized as "product quality issues" (RR VI-217).

Michael Nolan, an investigator for the District Attorney's Office, testified that he had heard about class-action lawsuits which had been brought due to the high breakage rate for Compaq/HP laptops during this time period, but he did not know any details of the suits (RR VI-143).

10 *De Minimis* Contribution to the Social Harm – In some cases, if the defendant's voluntary act caused minor social harm compared to the social harm resulting from a substantial, intervening cause, the law will treat the latter as the proximate cause of the social harm.

reads: "Compaq is recognizing INTELLIGENT INTERFACE, INC. for performing exceptionally well in both Customer Satisfaction and Operational Performance." "Intelligent Interface has held "premier" status, the best category (RR V- 180-182)".

B. Intervening in a judicial process

When a state offered witnesses making a false testimony, it is consider to be committing perjury [11] during the trail that is conspiracy to overturn the course of justice, intervening in a judicial process and concealing benefits from illegal acts.

The head of School, Sister Jane Meyer during the trail testifies that, "I was surprised that Ahmadi did not charge school for the three weeks virus work performed". The facts are that Ahmadi not only invoiced St. Agnes Academy for the three weeks of work performed on the viruses, School also paid these invoices with the check.

The false statement made by Meyer to the juries under the oath is nothing but committing perjury and intervening with justice during the trail,

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11 Other useful cases on perjured testimony include *United States v. Valentine*, 820 F.2d 565 (2d Cir. 1987) (reversing conviction when AUSA mischaracterized grand jury testimony during trial), and *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000) (reversing conviction when AUSA tolerated perjury from central government witness).

conspiracy to overturn the course of justice, and intervening in a judicial process.

C. The judge's statements during voir dire which diluted the concept of proof beyond a reasonable doubt.

Appellant argues that he was not provided an opportunity for full and fair trial of his Fourteenth amendment claim, because the state courts did not apply the proper constitutional case law (instruction to jury), Fourteenth Amendment violation, the presence of intervening circumstances.

D. Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

The seizure of the IBM evidence, Fourteenth Amendment violation, the presence of intervening circumstances.

The law is clear: prosecutors must reveal information pointing toward innocence of men charged with crimes. The U.S. Supreme Court said in Brady v. Maryland (1963) that prosecutors must "**promote justice**", rather than giving priority to winning a case.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests the Court to grant his petition for rehearing.

Respectfully submitted
Reza H. Ahmadi
7302 Wooded Valley Dr.
Houston, Texas 7709
713-515-6149

CERTIFICATION UNDER RULE 44.2

Pursuant to this Court's Rule 44.2, Ahmadi hereby certify that this Petition for Rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Ahmadi hereby also certify that this Petition for Rehearing is presented in good faith and not for delay.

Dated: April 20th, 2011

/s/ Reza Ahmadi

Reza H. Ahmadi